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No. 84-1390

In The
Supreme Court of the United States
October Term, 1984

MAX M. WILSON AND HELEN M. WILSON,
Petitioners,

vs.

POGO PRODUCING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Supreme Court should grant a writ of certiorari to review the Tenth Circuit Court of Appeals' affirmance of a United States District Court decision which properly and correctly applied state law precedent on a controlling state law issue?

LIST OF RELATED COMPANIES

Pogo Producing Company has no parent company and all of its subsidiaries are wholly owned. It is not affiliated with any other company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Pogo Producing Company presents this brief in response to Petitioners' Petition for Writ of Certiorari, requesting the United States Supreme Court to deny review of this case.

REASONS WHY THE WRIT SHOULD BE DENIED

Both the Tenth Circuit and the United States District Court for the District of New Mexico Properly and Correctly Applied Settled New Mexico Law in Rejecting Petitioners' Statute of Frauds Defense. The Application of this Law by both Courts Correctly followed the Rules of Decision Act (28 U.S.C. § 1652) on which Petitioners base their claim for review.

A. Application of State Law

Respondent Pogo Producing Company (Pogo) certainly agrees with the proposition that both 28 U.S.C. § 1652 and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) require a federal court to apply state law on a contract question in this diversity case. Petitioners have attempted to cast this case as one in which the federal courts below failed to follow state precedent. By setting forth the case in this way, Petitioners have attempted to create a significant federal issue for this Court to consider. However, the fatal defect in their position is that both the District Court and the Tenth Circuit correctly applied state law in reaching their decisions. Petitioners' arguments for review are themselves based upon propositions which are not the law in New Mexico, or in any other state.

B. Application of Statute of Frauds

The statement of the case set forth in Petitioners' Petition is substantially correct. It shows that the statute of frauds did not prevent the enforcement of the contract at issue, and in fact was entirely satisfied. The essential facts can be briefly summarized. Petitioners, the Wilsons,

owned the right to a federal oil and gas lease. On January 19, 1981, a representative of Pogo presented the Wilsons with a proposal to pay for an assignment of the lease on certain terms. The proposal letter stated that it would expire if Pogo did not receive an executed copy by 9 o'clock the next morning. Mr. Wilson desired to consult with his attorney before signing the agreement, but was unable to secure advice that day. The parties met the next day, shortly after the 9 o'clock deadline, discussed the agreement and the Wilsons then signed the agreement. The District Court found that under these facts Pogo had waived the deadline contained in its offer and the Wilsons then accepted the offer. As the Court stated:

> Since the deadline was waived, the original *offer* remained open at the time the defendants signed the document. Their signing of the document *constituted acceptance of the offer*. There being a valid offer and an equally valid acceptance, it is clear that the contract is valid.

(Opinion of the District Court, Reprinted in the Petition at App. 16, emphasis added.) The District Court further found that the same result could be reached even without a waiver, on the theory that the original offer was revoked when the deadline passed, and a new offer was made when Pogo's agents again sought to consummate the agreement. As a third and alternate ground, the District Court found that the Wilsons were estopped to deny the validity of the agreement by their "signing the offer and then representing to Pogo that the agreement was considered valid" thus inducing Pogo to act in reliance on the agreement. Thus, the District Court found three alternative grounds supporting its conclusion.

The Tenth Circuit affirmed the District Court on the grounds that its application of local contract law of the State of New Mexico was correct. The Tenth Circuit noted that New Mexico law recognizes the waiver of an express contractual condition from the conduct of the parties. Thus, both the district and appellate courts considering the issue reached the same conclusion, that the statute of frauds was inapplicable to prevent the enforcement of this contract.

Petitioners cite several cases for their argument that no enforceable contract was reached. However, each of these cases is inapposite because they do not controvert the basic principle upon which the validity of this contract rests. That principle is that the statute of frauds does not require that an *offer* be in any particular form, only that contracts concerning certain subjects be evidenced by a writing. The letter agreement proposal which contained the deadline in this case, at the time the "change" was made, was not an "agreement" as the Petitioners have attempted to characterize it, rather it was an offer. It could not be an "agreement" because it was unilaterally presented to the Wilsons for their consideration and acceptance. Before the Wilsons took any action, it did not create any rights other than a power of acceptance in the Wilsons.

In each case cited by the Petitioners, no writing in fact supported the contract claim. In *Pitek v. McGuire*, 51 N.M. 364, 184 P.2d 647 (1947), the New Mexico Supreme Court discussed the hypothetical case where a written employment contract was orally renewed upon expiration of its one year term. The Court stated that because the agreement was within the statute of frauds, it could not be extended by parol evidence. The Court's statement,

which Petitioners quote in their Petition, is that "[n]o *contract* within the statute of frauds that has expired by its terms can be revived and extended by parol." *Pitek*, 51 N.M. at 374, 184 P.2d at 653 (emphasis added). No New Mexico case, nor any general law regarding the statute of frauds, requires that an offer be in writing or prevents a written offer from being extended orally. As the District Court found as one of its alternate grounds, it may be said that although the written offer expired, an oral offer on the same terms was subsequently made and accepted by the Wilsons.

The other cases cited by Petitioners, *Mercury Gas and Oil Corp. v. Rincon Oil and Gas Corp.*, 79 N.M. 537, 445 P.2d 958 (1968), *Gonzales v. United Southwest National Bank of Santa Fe*, 93 N.M. 522, 602 P.2d 619 (1979) and *Adams v. Thompson*, 87 N.M. 113, 529 P.2d 1234 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974) all deal with the invalidity of oral extensions after the offer had been accepted and the written contract had expired by its own terms. Because these contracts (as opposed to offers) had expired by their terms, there was no writing evidencing the alleged obligation at the time enforcement was sought. In none of these cases did the Court hold that a written offer which had expired by its terms could not be revived by parol or conduct of the parties. Unlike the time limitations in the cases cited by Petitioners, the time limitation in the present case was on acceptance of the offer, not on the performance under the contract.

Contrary to Petitioners' free use of the terms, an "offer" is not an "agreement", and the statute of frauds does not require an offer to be in writing. It is succinctly stated by Professor Williston:

> Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the terms of his offer. Any such manifestation of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.

1 H. Jaeger, *Williston on Contracts,* § 53 at 171 (3d Ed. 1957). No New Mexico case controverts this basic principle.

Pitek sets forth the elements of a writing necessary to satisfy the statute of frauds in New Mexico. *Pitek* states that:

> To satisfy the statute of frauds the contract itself must be in writing; or if verbal, then there must have been some writing subsequently made however informal, stating each of its essential elements, signed by the person to be charged, or by his authorized agent acting for him.
>
> The essentials of such contracts have been stated as follows:
>
> "A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) Each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods, or other subject matter to which the contract relates, and (c) the terms and conditions of all the promises constituing the contract and by whom and to whom the promises are made."

Pitek, 51 N.M. at 371, 184 P.2d at 651-52, *quoting* Restatement, Contracts, Sec. 207. Petitioners have made no claim that the contract in this case did not contain the essential elements. Instead, they claim the time limitation expressed in the offer rendered the contract unenforceable. Under the circumstances, the time limitation contained in the offer was irrelevant, because the writing contained sufficient information to satisfy the statute of frauds. The time limitation on the offer was surplusage and irrelevant to the substantive portions of the agreement which satisfied the statute of frauds. "The statute of frauds only requires that there be written evidence to prove that the particular contract was made." *Jennings v. Ruidoso Racing Assoc., Inc.*, 79 N.M. 144, 441 P.2d 42 (1968).

Petitioners are further attempting to use the statute of frauds to perpetrate just what it is intended to prevent. Their statute of frauds defense is raised in order to perpetrate a fraud upon Pogo. The evidence was uncontroverted that the Petitioners signed the agreement after the deadline and in no way represented that they considered it invalid. Unless they intended their signatures to be a nullity and for some reason lead Respondent astray, they must have intended to accept the terms of the contract embodied in the letter from Respondent. To allow the Petitioners to now avoid their agreement would be to allow them to use the statute of frauds as an instrument of fraud. The universal rule is that this will not be allowed. *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 69 N.M. 281, 365 P.2d 925 (1961). The statute of frauds is not intended as an escape route for persons seeking to avoid obligations which they have undertaken. *Keirsey v. Hirsch*, 58 N.M. 18, 265 P.2d 346 (1953).

Petitioners state that "the impact of the Tenth Circuit's decision on the Petitioners is harsh. . . . Petitioners have been subjected not only to specific performance of the contract but also to punitive damages in the amount of $125,000.00." (Petition at 5-6). Pogo would state that the effect of this decision is appropriately harsh on Petitioners because their conduct warranted the imposition of these damages. The facts were uncontroverted that Petitioners were aware of the deadline stated in the offer, knowingly disregarded it and signed the agreement after the deadline passed. Further, Petitioners never raised the purported invalidity of the contract until after they had knowingly allowed Respondent to spend significant sums and time in reliance on the contract and then only after Petitioners had accepted an offer for double the amount which Pogo had paid for the lease right. Under these circumstances, the District Court found that the Petitioners knowingly and willfully breached the contract in order to obtain a more favorable contract. Thus, the harsh result imposed upon Petitioners is the direct result of their conduct towards Pogo. They have no right to be relieved of these penalties where they are the direct result of conduct which clearly warranted the imposition of punitive damages.

No New Mexico rule of law requires an offer to be in writing, nor does any rule prevent an oral or implied extension of a written offer which has expired by its terms. The statute of frauds requires only some memorandum indicating the essential terms of the agreement and signed by the parties. That statute of frauds requirement was clearly met here. The Petitioners willingly signed the memorandum, knowing that the written expiration time

had passed, and gave every indication that they intended to enter a binding contract. Both the Tenth Circuit and the District Court correctly applied New Mexico law to find that the statute of frauds did not prevent the enforcement of this contract and could not be used as a vehicle for the Petitioners to avoid the obligation they had willingly entered into. Because two federal courts correctly applied state law, no issue of federalism is raised in this case and it does not warrant consideration by this Court.

CONCLUSION

For the reasons stated above, Petitioners' request for a writ of certiorari to review the decision below should be denied.

Respectfully submitted,

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